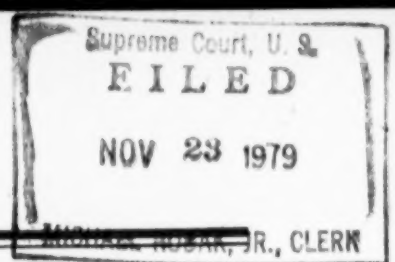


No. 78-1918



In The Supreme Court of the United States
OCTOBER TERM, 1979

**ADLENE HARRISON, REGIONAL ADMINISTRATOR,
AND DOUGLAS COSTLE, ADMINISTRATOR OF
ENVIRONMENTAL PROTECTION AGENCY, PETITIONERS**

v.

PPG INDUSTRIES, INC.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT**

BRIEF FOR THE PETITIONERS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 587 F.2d 237. The final decision of the Administrator (A. 97-98, 104-106) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22a) was entered on January 8, 1979. A timely petition for rehearing was denied on February 26, 1979. On May 23, 1979, Mr. Justice Powell extended the time within which to file a petition for a writ of certiorari to and including June 26, 1979. The petition was filed on June

25, 1979, and was granted on October 1, 1979 (A.108). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals has original jurisdiction under Section 307(b)(1) of the Clean Air Act, 42 U.S.C. (Supp. I) 7607(b)(1), to review a final action by the Administrator applying new-source performance standards to certain power generating facilities.

STATUTE AND REGULATIONS INVOLVED

1. Section 307(b) of the Clean Air Act, as amended by the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 776, and by Pub. L. No. 95-190, 91 Stat. 1404, 42 U.S.C. (Supp. I) 7607(b), provides:

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 112, any standard of performance or requirement under section 111, any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, any standard under section 231, any rule issued under section 113, 119, or under section 120, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), any order under section 111(j), under section 112(c), under section 113(d), under section 119, or under section 120, or his action under section 119(c)(2)(A), (B), or (C) (as in effect before the date

of enactment of the Clean Air Act Amendments of 1977) or under regulations thereunder, or any other final action of the Administrator under this Act (including any denial or disapproval by the Administrator under title I) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

2. Pertinent passages of the following provisions are reproduced in the Appendix, *infra*:

(a) 40 C.F.R. 60.5; and

(b) 40 C.F.R. 60.40 through 60.43.

STATEMENT

1. Section 111 of the Clean Air Act requires the Administrator of EPA to publish a list of categories of stationary sources which cause or contribute significantly

to air pollution. 42 U.S.C. (Supp. I) 7411(b)(1)(A). The Administrator is then directed to promulgate regulations establishing standards of performance for new sources within the list of categories. 42 U.S.C. (Supp. I) 7411(b)(1)(B). The Act defines "new source" as "any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source." 42 U.S.C. (Supp. I) 7411(a)(2).

On March 31, 1971, the Administrator published an initial list of stationary sources, which included "fossil fuel-fired steam generators." 36 Fed. Reg. 5931. Proposed regulations for this category were published on August 17, 1971 (36 Fed. Reg. 15704), and became effective on December 23, 1971 (36 Fed. Reg. 24876). These regulations set emission limits for three pollutants including sulfur dioxide. See 40 C.F.R. 60.1-60.15 and 60.40-60.46.

The regulations define a "fossil-fuel-fired steam generating unit" as "a furnace or boiler used in the process of burning fossil fuel for the purpose of producing steam by heat transfer." 40 C.F.R. 60.41(a). Regulated facilities are units having a heat-input rate of at least 250 million BTU per hour. 40 C.F.R. 60.40(a). For such furnaces or boilers, the regulations establish separate standards for particulate matter, 40 C.F.R. 60.42, for sulfur dioxide, 40 C.F.R. 60.43, and for nitrogen oxides, 40 C.F.R. 60.44. The regulations apply only to stationary sources for which construction or a modification was commenced after the proposal of the applicable standard (August 17, 1971). 40 C.F.R. 60.40(c). The regulations specifically provide that upon request by an owner or operator of a facility the Administrator will determine whether action taken or planned constitutes or will constitute construction,

modification or the commencement of construction or modification. 40 C.F.R. 60.5.¹

2. Respondent, PPG Industries, Inc., a chemical manufacturing corporation, constructed a power facility at its plant in Lake Charles, Louisiana (A. 8). The power facility was designed to utilize a coordinated system of two gas turbine generators, combined with two so-called "waste-heat" boilers (A. 65-66, 68). Each generator-boiler unit operates the same way. The gas turbine generator burns fossil fuel to create hot gases that turn the turbine to produce electricity. The "waste heat" exhausted from this process is funnelled into a waste-heat boiler to aid in the combustion of additional fossil fuel. This process produces high-temperature, high-pressure steam which turns a turbogenerator to create more electricity. This electricity and the low-pressure, spent steam are then used in PPG's chemical manufacturing process (A. 18-19, 51-52, 68).

In February 1975, Conoco Oil Company, PPG's fuel supplier, advised EPA that Conoco was switching from supplying natural gas to supplying fossil fuel (fuel oil) for PPG's fossil-fuel-fired steam generators in Lake Charles (A. 8). Because such a switch might have been a "modification" of the facility within the terms of 40 C.F.R. 60.14, EPA requested more information from PPG (A. 8-9, 11, 25-26). In May and June 1976, PPG submitted information concerning the boilers used at its plant and stated that the new power facility utilizing waste heat boilers had been designed and ordered in 1970, prior to the applicable date of the New-Source Performance Standard (NSPS) regulations (A. 12-24, 27-48). EPA nevertheless concluded that the waste-heat steam generators were subject to the provisions of the NSPS regulations (A. 49-50, 59-60). In December

¹The terms "construction," "modification," and "commenced" are specifically defined by the regulations. 40 C.F.R. 60.2(g), (h), (i).

1976, EPA advised PPG that because the construction of the two steam generators had commenced after the publication of the proposed regulations for fossil-fuel-fired steam generators, the fact that some of the equipment was ordered before this date was irrelevant (A. 59).

In April 1977, PPG submitted a formal request to EPA for a determination under 40 C.F.R. 60.5 that construction of the two waste-heat boilers commenced prior to the effective date of the regulations (so that the boilers were not "new source[s]"), or, in the alternative, for a determination that the NSPS regulations were inapplicable altogether to waste-heat boilers (A. 65-80, 82-94). PPG's submission included a memorandum of facts (A. 68-71) and a memorandum of law (A. 72-80). By letter of June 8, 1977, however, EPA advised PPG that the two waste-heat boilers were new sources subject to the regulations (A. 97-98).²

²EPA's letter of June 8, 1977, stated that performance tests would be conducted while the boilers were using 100% fuel oil. This prompted a request for clarification by the company on July 18, 1977 (A. 99-101). PPG expressed its understanding that the emissions standards for fossil-fuel-fired boilers would apply only during the performance tests and other times when the system was operating with 100% fossil fuel. However, since the planned mode of operation for the boilers depended on partial use of fossil fuel together with the turbine exhaust gas as a heat source, the emissions standards would not apply during the routine operation of the system.

A letter from EPA's Division of Stationary Source Enforcement on August 3, 1977, confirmed this interpretation (A. 102). That interpretation was contrary to EPA's previous determination in the June 8, 1977, letter and in similar cases (A. 104). On August 8, 1977, an EPA representative telephoned an official of PPG to notify it that the August 3d letter was incorrect (A. 103). This advice was then confirmed by EPA in its letter of August 18, 1977, in which EPA reaffirmed that the new-source performance standards applied to the waste-heat boilers and required PPG to install opacity monitors and to perform alternative monitoring tests (A. 104-106).

3. On October 4, 1977, PPG filed a petition in the court of appeals for judicial review of EPA's determination that the standards applied to the waste-heat boilers (A. 2-3). The following month, PPG also filed a complaint against the Administrator in the United States District Court for the Western District of Louisiana, seeking an injunction invalidating the agency's action. *PPG Industries v. Costle*, No. 77-1271 (W.D. La.).³ PPG then challenged the jurisdiction of the court of appeals, contending that its original jurisdiction extended only to review of those actions of the Administrator specifically enumerated in Section 307(b)(1) (see pages 2-3, *supra*). EPA argued that the jurisdiction of the court of appeals was not limited to review of the actions specifically enumerated in Section 307(b)(1) but expressly included review of "any other final action" of the agency and included the determination in this case.

The court of appeals held that "any other final action" in Section 307(b)(1) did not include EPA's determination that the PPG facility was subject to the NSPS regulations, for three reasons.⁴ First, the court noted (Pet. App. 11a) that prior to the 1977 amendment of Section 307(b), "the district courts and not the courts of appeals had jurisdiction [under 28 U.S.C. 1331] to review determinations of [such] local applications * * *."⁵ Although the 1977 amendment added the phrase "any other final action" to the statutory list of items to be reviewed by the courts of appeals, the court thought

³Continental Oil Company, intervenors in the petition for review, joined PPG as plaintiffs in the district court action. The jurisdiction of the district court was purportedly invoked under 28 U.S.C. 1331, 1332, and 1337.

⁴The court of appeals did not reach the merits of whether PPG's waste-heat boilers were new sources within the terms of the regulations. The district court action involving that issue has been informally stayed pending decision in this case.

⁵The preamendment language of Section 307(b)(1), 42 U.S.C. 1857h-5(b)(1), is set forth at note 6, *infra*.

that it was "most revealing" that the legislative history of this amendment made no reference to any "massive shift of jurisdiction to the courts of appeals" (Pet. App. 15a). This silence suggested to the court that Congress did not really mean to shift review of numerous local determinations by EPA to the court of appeals. Second, pointing out that the administrative record here consists mostly of correspondence, the court stated that an administrative determination based on a skeletal record should be reviewed by the district court in the first instance so that "[t]he discovery apparatus of district courts" could permit "fact and record development" (*id.* at 17a, 20a). Congress, the court of appeals surmised, must have inserted "any other final action" into Section 307(b)(1) with the "mechanical limitations of the courts of appeals in mind" (*id.* at 21a). Finally, the court noted that Section 307(b)(1) specifically enumerates certain determinations for review in the court of appeals before adding the phrase "and any other final action." This enumeration, the court thought, would be redundant if "any other final action" literally comprehended *any* final action (*id.* at 15a). Therefore, Section 307(b)(1)'s "any other final action" did not include a determination under 40 C.F.R. 60.5 that a specific facility is a new-source subject to NSPS regulations (*id.* at 20a-21a).

SUMMARY OF ARGUMENT

In the 1977 amendment to Section 307(b)(1), Congress expanded the jurisdiction of the courts of appeals to include review of all "final action[s]" of EPA under the Clean Air Act. The problem presented by this case is whether EPA's determination that PPG's boilers are subject to the new-source regulations is a "final action."

Three considerations support our conclusion that it is. First, EPA's action represents the agency's final determination, short of an enforcement action, of the issue whether the new-source regulations apply to PPG's

facility. That the determination is declaratory in form does not alter its status as a final action. Nor does it matter that the determination is the product of fact and law submissions to the agency and the agency's follow-up inquiries rather than the product of an evidentiary hearing. Such administrative declarations have been regarded as "final agency action" for the analogous purpose of review under the Administrative Procedure Act, 5 U.S.C. 704. They also should be regarded as "final" for the administrative review provisions of the Clean Air Act. That Congress so used the phrase in the Clean Air Act is demonstrated by the specific enumeration in Section 307(b)(1) of certain reviewable agency actions that are determined in very much the same way as the determination in this case.

Second, the legislative history shows that the addition of the "final action" clauses was intended to permit review of "essentially locally, statewide, or regionally applicable rules or orders to be reviewed in the U.S. court of appeals for the circuit in which such locality, State or region is located." H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 323 (1977). The legislative history at no point calls for review in the district courts. All references are to review of final actions in the courts of appeals.

Third, the purposes of preenforcement review would be better served by construing Section 307(b)(1) to include EPA determinations of the type in question. One purpose of preenforcement review is to resolve promptly the legal obligations of regulated persons before they are required to act at their peril. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-156 (1967). Had the court of appeals resolved the legal issue posed in this case, that purpose would have been served, and PPG would have obtained a final appellate determination of its rights and obligations without risking civil or criminal liability. Another purpose of preenforcement

review is to establish promptly the validity or invalidity of EPA's regulatory program and its component decisions. Had the Fifth Circuit reviewed EPA's interpretation of the statute and its regulations in this case, EPA would have obtained a prompt and final appellate approval or rejection of its interpretation, at least within the territory of the Fifth Circuit. See generally *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284 (1978). Significantly, if preenforcement review is unavailable under Section 307(b)(1) because the action is not a "final action," then preenforcement review is also unavailable under the Administrative Procedure Act, which permits review only of a "final agency action." 5 U.S.C. 704. Because the basic point of Section 307(b)(1) is to provide preenforcement review, Congress could hardly have intended any result which would completely frustrate the purposes of preenforcement review.

The court of appeals felt that preenforcement review of agency action based on a "skeletal record" would be better served by routing such cases through the district courts where discovery and additional fact finding could be used to augment the administrative record. Aside from the fact that inserting an additional layer of judicial review would frustrate prompt preenforcement review, it is well established that where an administrative record is too skeletal, the proper course is a remand to the agency for preparation of a more complete record, not judicially supervised discovery and fact finding. *Camp v. Pitts*, 411 U.S. 138, 141-143 (1973).

ARGUMENT

Prior to the Clean Air Act Amendments of 1977, Section 307(b)(1) provided that certain specifically enumerated actions of nationwide consequences were reviewable only in the District of Columbia Circuit and that certain local actions were reviewable only in the appro-

priate regional circuits.⁶ The 1977 amendment added to the list of actions reviewable exclusively in the District of Columbia Circuit "any other nationally applicable regulations promulgated, or final action taken" under the Act (emphasis added). In parallel fashion, the amendment added to the list of EPA actions reviewable only in the appropriate regional court of appeals "any

⁶Prior to the 1977 amendment Section 307(b)(1), 42 U.S.C. 1857h-5(b)(1), provided:

A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under Section 112, any standard of performance under Section 111, any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, or any standard under section 231 may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), or his action under section 119(c)(2)(A), (B), or (C) or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day.

The 1977 amendments to Section 307(b)(1), enacted on August 7, 1977, were in effect when PPG filed its complaint, but had not yet been enacted at the time EPA made its final decision regarding the PPG facility. The jurisdictional amendments changed only the applicable procedures for review, and not substantive law or rights already vested. As such, the amended Section 307(b)(1) applied to all subsequent review actions, regardless of the date of the pertinent agency decision. See *Denver & R.G.W.R.R. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556, 563 (1967); *Hallowell v. Commons*, 239 U.S. 506, 508 (1916).

other final action of the Administrator" under the Clean Air Act "which is locally or regionally applicable" (emphasis added). Congress, therefore, clearly meant to confine review of all "final action[s]," in the courts of appeals.

The plain meaning of "final action," the legislative history of Section 307(b), and its purpose all support our conclusion that EPA's determination in this case (that PPG's boilers are subject to its new-source regulations) is a "final action" within the meaning of Section 307(b)(1).

I. The Plain Meaning Of "Final Action" Includes EPA's Determination In This Case

The Clean Air Act does not define the term "final action," but the phrase has a traditional meaning. "[A]gency action" is defined by the Administrative Procedure Act to include "the whole or a part of an agency rule, order * * * or the equivalent * * * thereof * * * ." 5 U.S.C. 551(13).

An "order" means "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. 551(6) (emphasis added).⁷ Such a declaratory "order" may be issued to "terminate a controversy or remove uncertainty." 5 U.S.C. 554(e); see *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 625-628 (1973); *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 70-71 (1970); *Red*

⁷*ITT v. Local 134, IBEW*, 419 U.S. 428 (1975), held that an NLRB determination under Section 10(k) of the National Labor Relations Act is not an "order" under 5 U.S.C. 551(6) and therefore such a proceeding is not an "adjudication" subject to 5 U.S.C. 554. However, a Section 10(k) determination merely assesses whether there is "reasonable cause" to believe the striking union is entitled to the disputed work. See 419 U.S. at 444-

Lion Broadcasting Co. v. FCC, 395 U.S. 367, 372-373 n.3 (1969); *First Savings & Loan Ass'n of the Bahamas, Ltd. v. SEC*, 358 F.2d 358, 360 (5th Cir. 1966); *Phillips v. SEC*, 388 F.2d 964 (2d Cir. 1968); see generally, Comment, *Declaratory Orders—Uncertain Tools to Remove Uncertainty?* 20 Ad. L. Rev. 257 (1968); Note, *Administrative Declaratory Orders*, 13 Stan. L. Rev. 307 (1961).

The ruling in the present case is the agency's final disposition declaring the applicability of its new-source regulations to PPG's boiler operations. Short of an enforcement action, the agency has rendered its last word on the matter.⁸ PPG applied for a formal determination under 40 C.F.R. 60.5 concerning whether its facility is subject to the regulations. After consideration of PPG's submissions, including a law memorandum, EPA determined that the facility is subject to the regulations. PPG's disagreement with that determination turns only on an interpretation of the new-source regulations and their application to facts submitted by PPG. No further

446 & n.16. In the present case, in contrast, EPA's determination is not tentative and is its final disposition of the issue presented by PPG.

A "rule" means "the whole or part of an agency statement of general or particular applicability and future effect designed to * * * interpret * * * law or policy * * * ." 5 U.S.C. 551(4). Even if the ruling in the present case were not an "order," it is an agency statement of particular applicability designed to interpret the agency's regulations, *i.e.*, an interpretive ruling. It is thus an "agency action." See generally K. Davis, *Administrative Law Treatise* §7:3 (2d ed. 1979).

⁸Section 307(b)(1) refers to final action of the Administrator. The June 8, 1977, letter to PPG was signed by the Regional Administrator (A.97-98). "Administrator" is defined for purposes of the NSPS regulations as the Administrator "or his authorized representative." 40 C.F.R. 60.2(b). All requests for determinations on the applicability of the regulations are directed to the appropriate regional office of EPA. 40 C.F.R. 60.4. A final decision by the regional officer is, therefore, a "final action of the Administrator" within the statute.

administrative appeals remain and, unless PPG honors EPA's ruling, it will be enforced through enforcement proceedings under Section 113, 42 U.S.C. (Supp. I) 7413. Such an order, even though made without an evidentiary hearing, is "final agency action."⁹ *Red Lion Broadcasting Co. v. FCC*, *supra*, 395 U.S. at 372-373 n.3; *National Automatic Laundry and Cleaning Council v. Shultz*, 443 F.2d 689, 691-692, 698-699 (D.C. Cir. 1971); *Medical Committee for Human Rights v. SEC*, 432 F.2d 659 (D.C. Cir. 1970), vacated on other grounds, 404 U.S. 403 (1972). See generally K. Davis, *Administrative Law Treatise* §4.10 (1970 Supp.); Verkuil, *Judicial Review of Informal Rulemaking*, 60 Va. L. Rev. 185, 196-205 (1974); Note, *Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals*, 88 Harv. L. Rev. 980, 989-992 (1975).¹⁰

⁹The formal adjudicatory hearing provisions of 5 U.S.C. 554 do not apply to EPA's order inasmuch as Section 554 applies only to adjudications required by statute to be made "on the record." *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972); *United States v. Florida East Coast Ry.*, 410 U.S. 224, 238-246 (1973); *ITT v. Local 134, IBEW*, 419 U.S. 428, 438-441 (1975).

¹⁰Nor is finality defeated because the action is interpretive. In *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149-152 (1967), the court of appeals held that the rulings at issue were merely interpretive of the statute. See *Abbott Laboratories v. Celebrezze*, 352 F.2d 286, 288-289 (3d Cir. 1965). Without disagreeing with that characterization, this Court held the rulings were "final agency action" under 5 U.S.C. 704, and could be challenged under the Administrative Procedure Act. See also *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 162-163 (1967). *Frozen Food Express v. United States*, 351 U.S. 40, 45 (1956), held that an ICC "order" narrowly interpreting an exemption in a statute it enforced was "final" and ripe for review at the behest of a carrier adversely affected by the interpretation. Although the Court did not specifically address the issue in *Data Processing Service v. Camp*, 397 U.S. 150 (1970), and *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970), it necessarily assumed

That Congress used "final action" in this sense is evident from other provisions in Section 307(b)(1). EPA's determination in this case is akin to other types of actions specifically considered "final" under Section 307(b). For example, Section 307(b) makes "orders" under Section 112(c), 42 U.S.C. (Supp. I) 7412(c), reviewable only in the courts of appeals. Section 112(c) prohibits the construction of any new source which will "in the Administrator's judgment" emit "hazardous air pollutants" for which the Administrator has set a standard unless, among other things, "the Administrator finds that such source if properly operated will not cause emissions in violation of such standard * * *."¹¹ EPA has no formal procedures for making such judgments, and the statute specifies none. Consequently, such determinations are made by written inquiry and a letter response by the agency. An inquiry to the Administrator for his "judgment" whether a facility would emit hazardous air pollutants and, if so, for his determination that its proper operation would meet the

in those cases that the Comptroller's interpretive regulations challenged in those cases were final agency actions.

¹¹Similarly, Section 307(b) permits review in the court of appeals of "any order under section 111(j)." Section 111(e), 42 U.S.C. (Supp. I) 7411(e), prohibits the operation of new sources in violation of the new-source standards. Section 111(j), 42 U.S.C. (Supp. I) 7411(j), allows "[a]ny person proposing to own or operate a new source" to "request the Administrator for one or more waivers" in order to "encourage the use of an innovative technological system or systems of continuous emission reduction." The Administrator may grant the request after a public hearing. He may deny it without a hearing. Such "orders" are reviewable under Section 307(b). Once again, a denial of such a request is akin to a denial of PPG's request for a determination that its facility is not subject to the new source regulations at all. The activity in question has not yet occurred but is known. It is important to the requesting party to have a final agency determination and judicial review of the determination rather than to proceed at its peril.

specified effluent levels, is very similar to PPG's request under 40 C.F.R. 60.5 for a determination whether its proposed boilers would be covered by the new-source regulations. In both cases, the new source is not yet operational but the pertinent facts are known. In both cases, no formal hearing is held. In both cases, the applicant has a legitimate need for a final resolution before it proceeds at its peril.¹²

II. The Legislative History Demonstrates That Congress Intended To Expand Jurisdiction Under Section 307(b) To Include EPA's Determination In This Case

From the legislative history of the 1977 Amendments it seems reasonably clear that Congress meant to place review of all "final agency actions," as that phrase is traditionally used, in the courts of appeals. Prior to the 1970 amendment, the Clean Air Act did not provide for preenforcement review. See 42 U.S.C. (1964 ed. Supp. V) 1857-1857e. The Clean Air Act Amendments of 1970, however, provided for exclusive preenforcement review in the courts of appeals of certain enumerated actions. Certain standards and regulations of a national character were made reviewable by the District of Columbia Circuit. Certain actions of regional or local significance were made reviewable in the appropriate regional circuit. See generally S. Rep. No. 91-1196, 91st Cong., 2d Sess. 40-42 (1970); H.R. Conf. Rep. No. 91-1783, 91st Cong., 2d Sess. 47-48 (1970).

¹²Contrary to the suggestion of the court of appeals (Pet. App. 15a), there is no redundancy in the coexistence of the specifically enumerated items and our interpretation of "any other final action." The use of the word "other" eliminates any redundancy. Moreover, it is a well-established tradition in drafting to indulge in some redundancy out of an abundance of caution to make sure that certain specific matters are treated in a certain way rather than to trust to judicial interpretations of general statutory guidelines.

In 1976, Congress considered—but did not enact—comprehensive amendments to the Act proposed by the House Committee on Interstate and Foreign Commerce. Those amendments would have added a number of specifically enumerated "regulations," "standards," "findings," and "actions" to the national and local lists of actions reviewable in the courts of appeals under Section 307(b). The amendment did not, however, mention any review of "any other final action." Cf. H.R. Rep. No. 94-1175, 94th Cong., 2d Sess. 295, 396-397 (1976).¹³

¹³The House Committee bill in 1976 would have amended Section 307(b)(1) to read in pertinent part:

A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 112, any standard of performance under section 111 (b), *any finding of the Administrator under section 111(i)(7)(A), any regulation promulgated under section 111(d)(1), 121, 122, 123, 124(c), 125, 126(a), 152(f)(3), 154, 160, 207, or 302(i), any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1) or required to be prescribed under section 202(a)(3)(A) with respect to vehicles or engines manufactured during or after model year 1983), any determination under section 202(b)(5) or under section 202(a)(3)(B), any control or prohibition under section 211, or any standard under section 231 or under section 235 may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), or his action under section 119(c)(2)(A), (B), or (C), or his action under section 121 (other than the promulgation of regulations), or under regulations thereunder, his action in imposing a fee under section 122, his action under section 127(b), his action in approving any plan or making any designation or redesignation under section 160, may be filed only in the United States Court of Appeals for the appropriate circuit.*

H.R. Rep. No. 94-1175, 94th Cong., 2d Sess. 396 (1976) (material that would have been inserted by the amendment is italicized).

In December 1976, the Administrative Conference of the United States (see 5 U.S.C. 571-576) issued recommendations for amendments to the Clean Water Act, 33 U.S.C. 1311 *et seq.* and the Clean Air Act. 41 Fed. Reg. 56767 (1976), 1 C.F.R. 305.76-4. The Conference observed, among other things, that under the Clean Air Act "it remains possible in some circumstances to obtain non-statutory review under general federal question jurisdictional statutes" because "[n]ot every action of the EPA under the Clean Air Act * * * is made reviewable in the courts of appeals" and that at least "[s]ome of the omissions appear to be inconsistent with the general statutory plan * * *." 1 C.F.R. 305.76-4(d)(3), (5).

Perhaps the overriding recommendation was in urging that

when Congress reconsiders the judicial review provisions of the principal pollution statutes, it rationalize, alter and clarify them, guided especially by the principle that jurisdictional provisions should draw bright lines to minimize the waste and expense of litigation over whether a case has been brought in the right court. [1 C.F.R. 305.76-4(d).¹⁴]

¹⁴The Conference recommended, among other things, (a) that judicial review under the Clean Water Act be divided among the courts of appeals as under the Clean Air Act so that "review of * * * determinations affecting single states or facilities be had in the circuit containing the state or facility" (Recommendation A) (41 Fed. Reg. 56768 (1976)), and (b) that both acts enlarge the number of specifically enumerated items to be reviewed in the courts of appeals (Recommendation E). (The Conference did not mention or consider the possibility of placing review of "all final action[s]" in the courts of appeals.)

An amendment to Section 509 of the Clean Water Act, 33 U.S.C. 1369, similar to the 1977 amendment to Section 307(b)(1), was proposed in separate legislation but tabled. See Senate Committee on Environment and Public Works, A Legislative History of the Clean Water Act of 1977, 95th Cong., 2d Sess. 1012-1029 (1978).

It was against this background that a year later the House Committee on Interstate and Foreign Commerce again considered amendments to the Act. This time the committee, in revising Section 307(b), did not attempt to add more specifically enumerated items to the list of reviewable actions. Instead, the committee proposed simply to add all other "final actions" to both the national and regional review provisions of Section 307(b)(1).¹⁵

A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 112, any standard of performance under section 111, any standard under section 202 (other than a standard required to be

¹⁵Bracketed material was to be omitted and italicized material was to be added by the House committee amendment.

The committee proposed to revise the rest of Section 307(b) as follows:

Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. [Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day.] Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. No determination of the Administrator under section 122 shall be reversed by the court unless such determination is unsupported by substantial evidence on the record.

H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 440-441 (1977).

prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, [or] any standard under section 231, *any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act* may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), or his action under section 119(c)(2)(A), (B), or (C) or under regulations thereunder, *or any other final action of the Administrator under this Act which is locally or regionally applicable* may be filed only in the United States Court of Appeals for the appropriate circuit.

The committee explained:

Paragraph (1) of [Section 307(b)] makes it clear that any nationally applicable regulations promulgated by the Administrator under the Clean Air Act could be reviewed only in the U.S. Court of Appeals for the District of Columbia. These would include, to mention but a few examples, regulations to carry out the nonattainment policy referred to in section 117 of this bill and regulations to effectuate motor vehicle assembly-line test provisions of section 206 of the act or inspection/maintenance requirements under section 208 of this bill.

[The first two sentences provide] for essentially locally, statewide, or regionally applicable rules or orders to be reviewed in the U.S. court of appeals for the circuit in which such locality, State, or region is located. This provision applies, except as otherwise provided in paragraph (4), to the Administrator's action in approving or promulgating an implementation plan for any State.

H.R. Rep. No. 95-294, *supra*, at 323-324.

The committee thus made only one change in the two sentences establishing subject-matter jurisdiction. That change was to make "any other final action" not specifically enumerated reviewable in the courts of appeals. Since it was the only change, the committee obviously intended, in light of the otherwise parallel 1976 bill and Administrative Conference report, to enlarge jurisdiction and to enlarge it to all final actions. There is not the slightest indication that, as the lower court seems to have believed (Pet. App. 15a), the committee simply meant to confine review to the enumerated items. To the contrary, the House Report expressly cited examples (such as regulations to carry out the nonattainment policy referred to in Section 117 of the bill) of agency actions not expressly enumerated in Section 307(b)(1) which the committee intended to fall under "final action" (see page 20, *supra*). At no time, moreover, did the committee or the Congress refer to preenforcement review in the district courts.¹⁶ All references were to preenforcement review in the courts of appeals.

The "final action" phrase appears to have been the committee's response to the difficult drafting problem of making sure that each action deserving of review under the exhaustive legislation was covered by Section 307(b)(1). From its 1976 drafting, the committee was aware of the tedious task of augmenting the lists of spe-

¹⁶ To be sure, the committee observed that it was adopting in large measure the "venue" recommendation of the Administrative Conference. H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 324 (1977). Necessarily, however, it was also enlarging the subject-matter jurisdiction of the courts of appeals, for it was only the augmentation of subject-matter jurisdiction to include all final actions that necessitated the new assignment of venue along the national-local dichotomy in the first place. Obviously, the venue for the specifically enumerated items in the prior law had already been allocated, and they were not changed by the committee proposal.

cifically reviewable actions. The committee was presumably familiar with the Administrative Conference's observation that at least some EPA actions regarded as "final agency action" under the APA were being reviewed by the district courts under federal-question jurisdiction (see note 16, *supra*). That in 1977 the committee did not attempt again to predict each EPA action worthy of judicial review seems to have been a response to these factors. Instead, the committee preferred the comprehensive language of "final action" to include not only the specific items but also any other final determinations.¹⁷

¹⁷The House and Senate approved Section 307(b) as proposed by the House Committee. 123 Cong. Rec. H5150 (daily ed. May 26, 1977); S9478, S9490 (daily ed. June 10, 1977). Consistent with the intent to confine review of all final actions to the courts of appeals, the Conference Committee added Section 307(e), which provides that "[n]othing in this Act shall be construed to authorize judicial review of regulations or orders of the Administrator under this Act, except as provided in this section." 123 Cong. Rec. H8507, H8534 (daily ed. Aug. 3, 1977). This reinforces a congressional intention to place judicial review of all final agency decisions in the courts of appeals.

The Conference Committee added "any rule issued under section 120 (relating to noncompliance penalties)" to the list of specifically enumerated items in the first sentence and "any order under section 120" to the list in the second sentence. 123 Cong. Rec. H8535 (daily ed. Aug. 3, 1977). No explanation was given for this insertion. See 123 Cong. Rec. H8556 (daily ed. Aug. 3, 1977). The specification was arguably unnecessary to the extent that it would have been obvious such orders were final actions of local significance. As a drafting matter, however, it would not have been unusual to make such specifications out of an abundance of caution (see note 12, *supra*).

The same is true of the insertion of more specifically enumerated items in the "technical amendments" to the Act made a few weeks later in the Clean Air Act Technical and Conforming Amendments, Pub. L. No. 95-190, 91 Stat. 1399, 1404, which changed Section 307(b) to its present language. This amendment modified the first sentence to specifically enumerate regulations under Sections 113 and 119 and the second sentence to specif-

The Fifth Circuit's contrary view of the legislative history was based on the absence of any mention in the legislative history of a "massive shift" of jurisdiction to the court of appeals (Pet. App. 15a). Aside from the fact that committee reports need not say what is already obvious, the House Report clearly states that the amendment "provides for essentially locally, statewide, or regionally applicable rules or orders to be reviewed in the U. S. court of appeals for the circuit in which such locality, State, or region is located." H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 323 (1977). By contrast, there is no mention of judicial review in the district courts. Moreover, although the number of actions comprehended by "any other final action" is substantial, it would not seem so "massive" that it ineluctably would have provoked comment in the legislative history.

III. The Court of Appeals Incorrectly Concluded That Channeling Review Through the District Court Would Advance Preenforcement Review

The mainstay of the court of appeals' holding was its view that preenforcement review of EPA's determination in this case (and other actions not specifically enumerated in Section 307(b)(1)) would be better served by review in the district courts where, if necessary, "skeletal" administrative records could be aug-

ically enumerate regional review of orders under Sections 111(j), 112(c), 113(d) and 119 and made clear that orders issued under section 119(c)(2)(A), (B) or (C), as in effect before the 1977 amendments, were to be reviewed in the regional courts of appeals. The very brief legislative history on these amendments shows they were added to implement the "conference agreement providing for review of grant or denial of locally applicable orders in the appropriate circuit court, and review of nationally applicable regulations in the D.C. Circuit Court." 123 Cong. Rec. S18372-18373 (daily ed. Nov. 1, 1977); 123 Cong. Rec. H11956-H11957 (daily ed. Nov. 1, 1977).

mented by discovery and further fact finding (Pet. App. 17a-20a). This argument is unpersuasive for five reasons.

First, we do not think that the administrative record in this case is "skeletal." PPG had ample opportunity to submit all the information it felt was relevant to the determination, and EPA requested further facts it concluded were relevant. That information is contained in the administrative record.

Second, as we have seen (pages 15-16 and note 11, *supra*), the administrative record in the present case is comparable to the administrative record created during EPA actions under provisions in the Clean Air Act that are specifically required to be reviewed in the courts of appeals by the second sentence of Section 307(b)(1), such as actions under Sections 111(j) and 112(c). It is therefore hard to conclude that Congress intended to exclude from Section 307(b)(1) EPA actions based on similar administrative records.

Third, the court below thought that routing such cases through the district courts would advance preenforcement review by permitting fact development through discovery. Legal issues, however, may be resolved without discovery. Indeed, factual issues are usually resolved by the agency subject only to judicial review to determine whether the findings are based on substantial evidence or are not arbitrary. 5 U.S.C. 706. More fundamentally, if an administrative record is too skeletal to permit meaningful judicial review, the court — whether trial or appellate — must remand to the agency for further determination, not conduct evidentiary proceedings in court. *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976); *Camp v. Pitts*, 411 U.S. 138, 141-143 (1973); cf. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971).

Fourth, the basic purpose of Section 307(b)(1) — to provide preenforcement review — would be better

served by requiring review in the court of appeals of determinations such as the one at issue. One of the purposes of preenforcement review is to permit prompt review of an agency's interpretation of the law it enforces before affected persons act at their peril. See generally *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-156 (1967); *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 170-174 (1967); *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164-165 (1967). That purpose would have been served in this case had the court of appeals resolved the legal issue that casts a shadow over PPG's plans. PPG would have obtained a definitive ruling on the extent and type of abatement equipment required by the Act in order to operate the project rather than having to choose a course of action at the risk of choosing incorrectly. Another purpose of preenforcement review under the Clean Air Act, as the Court observed concerning Section 307(b) in *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284 (1978), is to assure that EPA's actions are promptly and finally reviewed in order to eliminate undue delay in achieving the goals of the statute. See generally S. Rep. No. 91-1196, 91st Cong., 2d Sess. 41 (1970). Congress specifically precluded judicial review in enforcement actions of any action reviewable under Section 307(b)(1). See Section 307(b)(2), 42 U.S.C. (Supp. I) 7607(b)(2). EPA's reviewable actions are thus final unless challenged on preenforcement review within 60 days.¹⁹ The objective of prompt and final review would have been better served had the court of appeals resolved the question of law at issue. A ruling favorable to EPA would have al-

¹⁹Section 307(b)(1) provides that a preenforcement review may be sought within 60 days after publication in the Federal Register of the nature of the "action" taken. Aside from defining precisely the time period within which review may be sought, this provision eliminates any possibility that judicial review would be precluded altogether because the affected person miscalculates and assumes the administrative action is not a

lowed it to apply the same legal principle in other cases with confidence in its validity at least within the Fifth Circuit. An adverse ruling would have permitted EPA to reconsider its legal theory.

Finally, if preenforcement review is unavailable in the court of appeals because the action is not "final," then, contrary to the assumption of the court of appeals (Pet. App. 11a), preenforcement review is not available at all—even in the district courts. As here, only "final agency action" is reviewable under the Administrative Procedure Act. 5 U.S.C. 704. Such a result would frustrate the purposes of preenforcement review. It would also contravene the established rule that adverse agency action is presumed to be subject to effective judicial review. *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971); *Abbott Laboratories v. Gardner*, *supra*, 387 U.S. at 141.²⁰

final agency action. Publication in the Federal Register will put such persons on notice that the agency regards the action as final. They may then seek preenforcement review if they have not already.

EPA did not publish the PPG determination. The only effect of this lapse is a tolling of the running of the 60-day limitation on review. EPA has adopted a policy of publishing in the Federal Register notice of actions such as the determination made in this case. In addition, EPA now has a practice of advising parties such as PPG that the agency regards its action as final and that failure to seek timely preenforcement review will preclude any challenge to the determination in subsequent enforcement actions.

In this connection, EPA enforcement proceedings at the agency level are not "final actions" reviewable under Section 307(b)(1). Once agency action has reached the enforcement stage, preenforcement review is no longer available. See H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 324 n.12 (1977), citing *Lloyd A. Fry Roofing Co. v. EPA*, 415 F. Supp. 799 (W. D. Mo. 1976), later affirmed, 554 F.2d 885 (8th Cir. 1977).

²⁰ Even if preenforcement review were available in the district courts, as the court below held (Pet. App. 11a), direct resolutions by the courts of appeals eliminate a layer of judicial

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be vacated and the case remanded for consideration of the merits.

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review and thereby allow more prompt validation or rejection of EPA's construction of the Act and its regulations.

It does not follow, however, that the court of appeals must automatically exercise its jurisdiction to review every final action by EPA under the Act challenged in the court of appeals. As *Toilet Goods Ass'n, v. Gardner*, 387 U.S. 158, 162-164 (1967), illustrates, "final agency action" may not, in some circumstances, be ripe for judicial review. Cases may arise under the Clean Air Act where a formal determination by EPA under 40 C.F.R. 60.5 is final but based on sketchy facts and highly hypothetical contingencies. See *New York Stock Exchange v. Bloom*, 562 F.2d 736, 740-742 (D.C. Cir. 1977). In such a case, the court of appeals might well dismiss the petition as premature. Given the concrete facts and live controversy in the present case, however, such a dismissal on ripeness grounds (a course of action not considered below) would not have been proper.

APPENDIX

Excerpts from 40 C.F.R. 60.5-60.43

§60.5 Determination of construction or modification.

(a) When requested to do so by an owner or operator, the Administrator will make a determination of whether action taken or intended to be taken by such owner or operator constitutes construction (including reconstruction) or modification or the commencement thereof within the meaning of this part.

(b) The Administrator will respond to any request for a determination under paragraph (a) of this section within 30 days of receipt of such request.

* * * * *

Subpart D—Standards of Performance for Fossil-Fuel Fired Steam Generators**§60.40 Applicability and designation of affected facility.**

(a) The affected facilities to which the provisions of this subpart apply are:

(1) Each fossil-fuel-fired steam generating unit of more than 73 megawatts heat input rate (250 million Btu per hour).

(2) Each fossil-fuel and wood-residue-fired steam generating unit capable of firing fossil fuel at a heat input rate of more than 73 megawatts (250 million Btu per hour).

(b) Any change to an existing fossil-fuel-fired steam generating unit to accommodate the use of combustible materials, other than fossil fuels as defined in this subpart, shall not bring that unit under the applicability of this subpart.

(c) Except as provided in paragraph (d) of this section, any facility under paragraph (a) of this section that

commenced construction or modification after August 17, 1971, is subject to the requirements of this subpart.

(d) The requirements of §§60.44(a)(4), (a)(5), and (b) and (d), and 60.45(f)(4)(vi) are applicable to lignite-fired steam generating units that commenced construction or modification after December 22, 1976.

§60.41 Definitions.

As used in this subpart, all terms not defined herein shall have the meaning given them in the Act, and in Subpart A of this part.

(a) "Fossil-fuel fired steam generating unit" means a furnace or boiler used in the process of burning fossil fuel for the purpose of producing steam by heat transfer.

(b) "Fossil fuel" means natural gas, petroleum, coal, and any form of solid, liquid, or gaseous fuel derived from such materials for the purpose of creating useful heat.

(c) "Coal refuse" means waste-products of coal mining, cleaning, and coal preparation operations (e.g. culm, gob, etc.) containing coal, matrix material, clay, and other organic and inorganic material.

(d) "Fossil fuel and wood residue-fired steam generating unit" means a furnace or boiler used in the process of burning fossil fuel and wood residue for the purpose of producing steam by heat transfer.

(e) "Wood residue" means bark, sawdust, slabs, chips, shavings, mill trim, and other wood products derived from wood processing and forest management operations.

(f) "Coal" means all solid fuels classified as anthracite, bituminous, subbituminous, or lignite by the American Society for Testing Material. Designation D 388-66.

§60.42 Standard for particulate matter.

(a) On and after the date on which the performance test required to be conducted by § 60.8 is completed, no owner or operator subject to the provisions of this subpart shall cause to be discharged into the atmosphere from any affected facility any gases which:

(1) Contain particulate matter in excess of 43 nanograms per joule heat input (0.10 lb per million Btu) derived from fossil fuel or fossil fuel and wood residue.

(2) Exhibit greater than 20 percent opacity except for one six-minute period per hour of not more than 27 percent opacity.

§60.43 Standard for sulfur dioxide.

(a) On and after the date on which the performance test required to be conducted by §60.8 is completed, no owner or operator subject to the provisions of this subpart shall cause to be discharged into the atmosphere from any affected facility any gases which contain sulfur dioxide in excess of:

(1) 340 nanograms per joule heat input (0.80 lb per million Btu) derived from liquid fossil fuel or liquid fossil fuel and wood residue.

(2) 520 nanograms per joule heat input (1.2 lb per million Btu) derived from solid fossil fuel or solid fossil fuel and wood residue.

(b) When different fossil fuels are burned simultaneously in any combination, the applicable standard (in ng/J) shall be determined by proration using the following formula:

$$PS_{pr} = [y(340) + z(520)]/y + z$$

Where:

PS_{pr} is the prorated standard for sulfur dioxide when burning different fuels simultaneously, in nanograms per joule heat input derived from all fossil

fuels fired or from all fossil fuels and wood residue fired.

y is the percentage of total heat input derived from liquid fossil fuel, and

z is the percentage of total heat input derived from solid fossil fuel.

(c) Compliance shall be based on the total heat input from all fossil fuels burned, including gaseous fuels.

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